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The Memorable CASE OF Denzil Onslow Esq;

Tryed at the ASSIZES in *Surrey*, *July* the 20th, 1681.

Touching his ELECTION At *HASELMERE* in *Surrey*.

Wherein is much good Matter and Direction touching the due ordering of ELECTIONS for PARLIAMENT.

At the Assizes holden for *Surrey* on *Wednesday* the Twentieth day of *July*, in the year of our Lord 1681. at *Kingston* upon *Thames*, was tryed before the Lord Chief Justice of *England* Sir *Francis Pemberton*, this Cause.

The DECLARATION.

DEnzil Onslow *Esq*; *had brought his Action on his Case in the Court of* Common Pleas, *against* William Rapley *late Bayliff of the Burrough of* Haselmere; *thereby setting forth, that* Haselmere *was an ancient Burrough that used to send Burgesses to Parliament. That a Writ issued to the Sheriff of* Surrey *to cause Knights and Burgesses to be chosen for the Parliament to be held the* 17th *day of* October, Anno 31 Caroli Regis. *The Sheriff made a Precept to the Burrough of* Haselmere, *to chuse Burgesses. That* August 31. Anno 31 Caroli secundi, *the Plaintiff was duely elected one of the Burgesses, and returned by Indenture with Sir* William Moore. *That the*

Defendant intending to deprive the Plaintiff of the honour and benefit of his Election, did by another Indenture return Sir William Moore *Bar. and* James Greſham *Eſq; as duely elected, whereas the ſaid* Greſham *was not duely elected; whereby the Plaintiff was hindered from ſitting in Parliament, and put to great charge to aſſert his Right, to his damage of* 200 l.

After Not guilty pleaded, upon Evidence given on both ſides at the Tryal, the Caſe appeared to be thus:

The CASE and EVIDENCE.

AT the Election in this Burrough for the laſt Parliament at *Weſtminſter*, there were four Competitors, *viz.* Sir *William Moore*, the Plaintiff, Mr. *Dorrington*, and Mr. *Greſham*. The Electors meeting and voting, the Poll was demanded, granted, and taken: the Defendant took time to peruſe and conſider the Poll, until the afternoon; and having conſidered of it, came again to the place of Election, and declared the Plaintiff and Sir *William Moore* had the majority of the ancient and lawful Burgeſſes, and proclaimed them two to be duely elected, and ſealed an Indenture thereof accordingly; and Mr. *Greſham* being then preſent, oppoſed not the ſame, but deſired that Sir *William Moore* (with regard to his Title and Quality) might be firſt named in the Indenture, although (as was then admitted) Mr. *Onſlow* had the majority of him; which was done accordingly, Mr. *Onſlow* readily and generouſly conſenting to the doing thereof.

That about a week or a fortnight after, the Bayliff was prevailed with to ſeal and return another Indenture, whereby Sir *William Moore* and Mr. *Greſham* were returned as elected. Whereupon Mr. *Onſlow*'s Right to ſit was controverted, and he ſuſpended from ſitting; and was put to his Petition to the Houſe of Commons. Who upon hearing of the whole matter, and conſideration had of the indirect dealing of the Plaintiff and others, declared Mr. *Onſlow* duely elected, and committed the Defendant. And Mr. *Onſlow* ſate in the laſt Parliament at *Weſtminſter* for that Burrough, and that Mr. *Onſlow* had been at great charges to clear his Election.

Firſt, The Defendants Counſel inſiſted on the Statute of 1 *H.* 5. *cap.* 1. That a perſon elected muſt be free, reſiant, and dwelling within the Burrough. To which it was anſwered, and reſolved by the Court, That little or no regard was to be had to that ancient Statute, foraſmuch as the common practice of the Kingdom had been ever ſince to the contrary; and it was the way to fill the Parliament-houſe with men below the Employment: and the Objection was diſallowed.

2. It was agreed unto by the Parties and their Counſel on both ſides, that the right of Choice of Burgeſſes for this Burrough to Parliament, lay in the Burgage-Freeholders, reſiant and inhabiting within the Burrough, and none others.

Then the Plaintiffs Counſel inſiſted and proved, that there voted for him thirteen, having good and unqueſtionable Votes; unto one whereof, the Defendants Counſel excepted, for that he before the Election had mortgaged his Eſtate: Which the Party himſelf, preſent in Court, denied upon Oath; and the Court was of opinion, it had not been a

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good Objection, if true, ſo long as the Mortgager continued the poſſeſſion, and had the benefit of redemption in him.

The Defendant's Counſel ſaid, there voted for Mr. *Greſham* 14, having good Votes; which if ſo, would have made a Majoritie: but the Plaintiff's Counſel excepted to ſix of the 14, as being no good electors, for that one of them lived not within the Burrough; which was proved by ancient reputation and perambulation, that the houſe where he lived was left without the bounds. As to the other five, the Objection was, they were no real Burgage-tenants; and that if any Conveyances had been made to them of Burgage-lands, they were lately made, and fraudulently contrived, to make Votes againſt an Election: and becauſe the Defendant's Counſel could not deny but theſe Conveyances were lately made, the Court put the Defendant to to produce & prove them, which was done; and upon reading of them, it appear'd two of the five were made after the Teſt of the Parliament-writ, and three of them in order to carry on Sir *Philip Floyd*'s election in the Burrough about five years ſince. Two of them were Conveyances by one *Vallor*, who had a Garden of about 30 Rods content, and conveyed to each of his two Sonsa piece of it containing about ten Rods, of which they had made Joyntures to their Wives, each ſhare being worth at beſt 2 *s. per Annum.* Another of the five was made by a Father who had a Cloſe containing two Acres, and made a Conveyance to his Son of about a quarter of an Acre, which always after lay undivided, and was conſtantly enjoyed by the Father. Another Conveyance was made by a Son-in-law to his Father-in-law, of a Carthouſe. The laſt was a Conveyance to one *Jackſon* of a little Tenement; but it was proved that collateral ſecurity was given to re-convey, and that the Grantor had repaired it. As to all five, there appeared ſeveral badges of fraud, as a continued poſſeſſion in the Grantors, *&c.* and the ſeveral Confeſſions of the purpoſe and intent of making them for the Elections.

The matter appearing ſo foul, the Court began ſeverely to cenſure ſuch proceedings as evil and unlawful: Mr. *W.* (Recorder of *G.*) one of the Defendant's Counſel, ſtood up to juſtifie theſe proceedings, and ſaid it was part of the conſtitution of our Government to do ſo. At which the Court ſeemed very angry, and wondred that any one, eſpecially a man of the Gown, ſhould ſay ſo; and ſaid, Do you think our Government hath no better conſtitution? With which the Gentleman not being ſatisfied, he was told by the Court, he deſerved to be taken notice of for ſaying ſo, and that he ſeemed to have adviſed the thing done.

To conclude the Evidence, the Plaintiffs Counſel delivered into Court ten or twelve ſeveral Conveyances that were proved by the partie that wrote them, to have been made by Mr. *G.*'s order, to make ſo many Votes at a former election, wherein Mr. *Greſham* was concerned; and the Election being over, they were cancelled and delivered up: concerning which Mr. *Greſham* endeavoured to ſay ſomething by way of excuſe, but was told by the Court, it was too bad to be excuſed; and it was well an Act of general pardon had paſſed ſince this was done, elſe he ſhould have anſwered it in another place. During the whole time of the Trial, the ſame was managed with great patience

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and circumſpection; for ſo ſoon as the Cauſe was opened by the Plaintiffs Counſel, the Court, perceiving the nature of it, commanded ſilence, and attention in the Jurie: The Court declaring it was of great weight, as great as any that ever came there to be tried. And the Evidence being fully given on both ſides, the Court by way of direction told the Jurie, that the Plaintiff need not, as this Caſe is, prove any expreſs malice in the Defendant; for it ſhall be intended when a man ſhall do ſuch an evil thing as this is contrary to his own knowledge, and declaration made upon the election and afterwards alſo; (for it was proved againſt him by one or two Witneſſes, that a little time before this Trial he did confeſs Mr. *Onſlow* was duly elected, and that he had told Mr. *Greſham* what would come of it.) And the Court further told the Jurie, that this was a Cauſe of moment, and deſerved more than ordinarie conſideration; and that the making Votes by ſuch means, was a very evil and unlawful thing, and tended to the deſtruction of the Government, and debauching of Parliaments: and although ſome of the Conveyances were made ſome time before his election, to ſerve a turn at a former choice; yet that they were fraudulent, and void in their creation, and ought not to be made uſe of at any time againſt any other perſon; and that it was ſenſeleſs to think ſuch practices were part of the Conſtitution of our Government, or to imagine that perſons whom we entruſt with our Lives and Fortunes ought to be made and choſen by ſuch evil devices; and that ſuch practices deſerve to be ſeverely puniſhed, and directed the Jurie to give ſignal Damages: Whereupon the Jurie withdrew, and after a ſhort ſtay gave a Verdict for the Plaintiff, and 50 *l.* damages.

And the Court in the courſe of the Evidence having obſerved one *Billinghurſt* to be much concerned in the proof and management of their fraudulent deeds, conceived him to be privy to much of the practice thereabouts, and commanded him to ſtay in Court until the Jurie had given in their Verdict; which when they had done, the Court required him to find Sureties to appear in the Court of *Kings-Bench* next *Michaelmas*-Term, to anſwer to an Information touching the ſaid Miſdemeanour; and in the mean time to be of the Good Behaviour: which accordingly he did do; and Sir *William Moor*, and Sir *George Woodruff* (whom he had ſerved in the laſt Election at *Haſelmere*) were his Sureties. And the Court required the Plaintiff, Mr. *Onſlow*, to ſee that an Information be preferred; which he promiſed to do: And the Court declared it was a very great offence, and ſhould be ſeverely puniſhed.

The Court had great reaſon to ſhew an extraordinary abhorrency of ſuch practices, for that the miſchief is grown almoſt general. To rectifie and puniſh which abuſes, the Houſe of Commons in every Parliament are compelled to ſpend near half their time. And ſuch is the frowardneſs of evil-minded men, as neither to forbear the practice, nor to acquieſce under the puniſhment, but to cry out of too much ſeverity therein, when it bears no proportion to the offence, nor indeed can, when a man ſhall duely conſider and weigh the great and important truſt left with, and repoſed in every Parliament-man by his choice, who is thereby intruſted with Life, Religion, Liberty, Eſtate,

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indeed all. And every one ſo choſen, is a Counſellor, as he is a Member of the *Commune Concilium* of the Nation: And although one be choſen for one particular County or Burrough, yet when he is returned and ſits in Parliament, he ſerveth for the whole Realm; and undue and contrived Choices, are injurious, 3 H. 6. n. 3. 4 Inſtit. 3. 4 Inſt. 14.

1. To thoſe that have right to elect according to the cuſtom of the place; and ſuch right to chuſe being a Priviledge accompanied with ſo great a Truſt, ought not by them be eaſily parted with, nor by others be injuriouſly invaded.

2. To the perſons that are duely and fairly elected: for although it be a Truſt without any legal recompence but Wages, and thoſe no way proportionate to the charge or burthen of the place; yet it is attended with Confidence and Honour in a due diſcharge of it: and although a man ought not ſeek it too earneſtly, yet he may and ought to accept it courteouſly; for the deference of ſo great a Truſt, ſuppoſes Merit.

3. To the whole Kingdom, who have an intereſt in every Members ſervice; and 'tis odds, that he that obtains an Election or Return by the worſt means, will uſe it to the worſt end: for ſuch devices are commonly the attempt of deſigning men; and by ſuch courſes get into our Councils debauched, impudent, ambitions, needy, covetous perſons.

4. To the King, whoſe Laws are thereby broken, and his Government invaded. How many good Laws have we to regulate Elections, with reſpect to the Electors, Elected, time, place, and manner of Election and Return! So that nothing remains unprovided for by Parliament, but what was thought too evil to be committed; namely, the corrupt obtaining and ill uſing ſo great a Truſt: a Truſt, without particular profit to any, ſave Penſioners (if ſuch there be;) a weighty Truſt, which neither they that confer it, or thoſe who receive it, can duely value, without a true notion of an Engliſh Parliament, whoſe power over both Statute and Common Law, take in the accurate and ſignificant words of a Parliament, *viz.* 25 *H.* 8. 21. Whereas this Realm recognizing no Superiour under God, but the King, hath been and is free from any mans Laws, but onely to ſuch as have been deviſed, made, and ordained within the Realm for the wealth thereof, or to ſuch other as the People of this Realm have taken at their free liberty by their own conſent to be uſed amongſt them, and have bound themſelves by long uſe and cuſtom to the obſervance of the ſame; not the obſervance of the Laws of any foreign Prince, Potentate, or Prelate, but as to the accuſtomed and ancient Laws of this Realm, originally eſtabliſhed as Laws of the ſame, by the ſaid ſufferance, conſents, and cuſtom, and none otherwiſe. It ſtandeth therefore with natural equity and good reaſon, that in all and every ſuch Laws humane made within this Realm, or induced into this Realm by the ſaid ſufferance, conſents, and cuſtom, The King, and Lords Spiritual and Temporal, and Com-

mons, repreſenting the whole Eſtate of the Realm in the moſt high Court of Parliament, have full Power and Authority to diſpence with thoſe and all other humane Laws of the Realm, and with every one of them, as the quality of the perſons and matter ſhall require: And alſo the ſaid Laws and every of them to abrogate, adnul, amplifie, or diminiſh, as it ſhall be ſeen unto the King and the Nobles and Commons of the Realm préſent in Parliament, meet and convenient for the wealth of the Realm.

By this great Act we clearly ſee, it is beyond the wit and reaſon of any man to contradict or deny the ancient and Supream power of the Parliament, as well in matters Eccleſiaſtical as Civil: a Statute it is declarative of the Law of the Kingdom, and that of as great force and uſe as ever any was, is, or can be made by the Legiſlative power and authority of this Nation. The Lord *Coke* alſo bears teſtimony to this truth; The power of Parliaments is ſo tranſcendent and abſolute for making Laws in proceeding by Bill, as it cannot be confined either for cauſes or perſons within any bounds. Take all that ſhall be ſaid hereof in the words of Sir *Tho. Smyth*, a man of great knowledge in the Law, and in great place and eſteem under Q. *Eliz.* The moſt high and abſolute power of the Realm of *England*, conſiſteth in the Parliament. A Parliament abrogateth old Laws, maketh new; giveth order for things paſt, and for things hereafter to be followed; changeth Rights and Poſſeſſions of private men, legitimateth Baſtards, eſtabliſheth forms of Religion, altereth Weights and Meaſures, giveth form of Succeſſion to the Crown, defineth of doubtful Right whereof is no Law already made; appointeth Subſidies, Tailes, Taxes, and Impoſitions; giveth moſt free Pardons and Abſolutions; reſtoreth in Blood and Name, and repreſenteth, and hath the power of the whole Realm both Head and Body.

4 Inſtit. 36.

But becauſe here is by Statute-Law no particular proviſion made againſt ſuch frauds and practices as appear in the foregoing Caſe, many by ſordid means have endeavoured to perplex Elections and debauch Parliaments, and think themſelves not puniſhable for it. This Caſe, and the reaſon of it, will better inform them, that by the rule of the Common Law an offence of this nature is puniſhable; for will any man think that ſmall frauds, cheats, and practices ſhould undergo a cenſure in the ordinary Courts of Juſtice, and not ſuch great violations of truth and honeſty in matters of the greateſt moment? But I hope the proceedings againſt *Billinghurſt* will convince ſome men of their miſtakes, others of their faults.

And to bring men to a ſober conſideration of their duty and danger, I ſhall give a few inſtances of what the Houſe of Commons have done in former ages to puniſh and prevent evils about Elections.

1. *Anno* 20 *Jacobi*, Doctor *Harris* Miniſter of *Blechingly* in *Surrey*, for misbehaving himſelf by preaching and otherwiſe about Election of Members of Parliament, upon complaint was called

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to the Bar of the Houſe of Commons, and there as a Delinquent on his Knees had Judgement to confeſs his fault there, and in the County, in the Pulpit of his Pariſh-Church, on Sunday before the Sermon.

2. *Anno* 21 *Jacobi*, *Ingrey* Under-ſheriff of *Cambridge-ſhire*, for refuſing the Poll upon the promiſe of Sir *Thomas Steward* to defend him therein, kneeling at the Bar, received his Judgment to ſtand committed to the Serjeant at Arms, and to make ſubmiſſion at the Bar, and acknowledge his offence there, and to make a farther ſubmiſſion openly at the Quarter Seſſions, and there alſo to acknowledge his fault.

3. *Anno* 20 *Jacobi*, the Mayor of *Arundel*, for misbehaving himſelf in an Election, by putting the Town to a great deal of charge, not giving a due and general warning, but packing a number of Electors, was ſent for by Warrant, and after ordered to pay all the charge; and the Houſe appointed certain perſons to adjuſt the Charges.

4. And laſtly, 3 *Car.* 1. Sir *William Wray* and others, Deputy-lieutenants of *Cornwal*, for aſſuming to themſelves a power to make whom they pleaſed Knights, and defaming thoſe Gentlemen that then ſtood to be choſen, ſending up and down the Countrey Letters for the Trained Bands to appear at the day of the Election, and menacing the Country under the title of his Majeſty's pleaſure; had Judgement given upon them, to be committed to the *Tower*. 2. To make a recognition of their offence at the Bar of the Houſe upon their Knees; which was done. 3. To make a recognition and ſubmiſſion at the Aſſizes in *Cornwal*, in a form drawn by a Committee.

To conclude, this Caſe being of great uſe, is now made publick,

1. To evidence to the world the wrong done the Plaintiff by the Bayliff's unjuſt return, and by whom, and by what means procured; as alſo to teſtifie his courage and generous reſolution to aſſert his own Right, and the Peoples juſt Liberty of Choice, with his utmoſt care, and great charge.

2. To vindicate the Juſtice of the Houſe of Commons, which are frequently aſperſed as ſhewing too great affection to perſons in their proceedings touching Elections; whereas by this Caſe it appears how juſt they were in bringing Mr. *Onſlow* to ſit as a Member according to the ſtricteſt rules of Common Law, and in puniſhing the Bayliff who ſo wilfully offended.

3. To direct places, having right to elect, to manage the ſame duely and lawfully, not onely to caution them againſt making Votes by ſplitting Burgage-Tenures by ſuch fraudulent Conveyances, where the Choice

Choice is annext to ſuch Tenure, (all ſuch Conveyances as are not real, and made *bona fide* upon good conſideration, being in this Caſe held to be void by the Common Law:) but the reaſon of this Caſe will extend to other ways of Election: for where the Choice is by the Body Corporate, the putting out without juſt cauſe ſuch as are incorporate, or the making other Members of the Corporation to ſerve a turn at an Election, will be equally dangerous, and alſo ineffectual. For as thoſe that are ſo put in, gain hereby no right to elect; ſo thoſe that are ſo put out, loſe no priviledge of Vote: and the Officers and perſons doing the ſame, are by the reaſon of this Caſe ſeverely puniſhable.

So likewiſe in caſe of Elections by Inhabitancy; the coming to live in a place for a ſmall time upon ſome particular occaſion, or coming to or taking a houſe for to ſerve an Election, doth not give right to vote, as was (conformable to the Rules of the Common Law, and the reaſon of this Caſe) determined by the Houſe of Commons in the Caſe of *Windſor*, touching ſuch as came to live there in attendance on the Court, although they ſtayd there three or ſix months.

In like manner, where the Election ought to be by thoſe that pay Lot and Scot, as they call it, whereof the Poor-Tax is the uſual meaſure; if any are put out by deſigne that have paid or ought to pay, or any by like deſigne are put in that have not paid, or cannot or ought not to pay, the one loſeth, the other getteth no Vote; and the doing of it in order to further an Election thereby, is an offence at Common Law, and puniſhable. So alſo where Elections are by freedom of places: for as Elections are to be free in reſpect of Terrour and Conſtraint, ſo are they to be candid without fraudulent practices and deſignes.

FINIS.

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